system, may treat the parties symmetrically and thus fairly.[3] Yet symmetry can exist (or not exist) in all types of electoral systems. Because most electoral systems in the United States are single-member districts that are winner-take-all, in practice they normally give a "bonus" of varying sizes (above proportionality) in seats to the party that wins a majority of the votes across a state. This common pattern does not violate the symmetry standard.[4] Nothing in the symmetry standard prevents States, either directly or because of the way in which districts happen to be drawn, from giving a greater percentage of seats to the victorious party than that party's total vote proportion. Indeed, in States where the plan is "fair" either because of bipartisan redistricting or a neutral districting commission, symmetry exists in complete harmony with the "bonus" given to the majority party due to the United States' single-member district system.

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[3] Electoral systems that mandate versions of proportional representation do not necessarily produce partisan symmetry. See Browning & King, *Democratic Representation*, 81 Am. Pol. Sci. Rev. at 1257 Fig. 2 (modeling bias in a proportional representation system). Many European nations that use proportional representation have electoral systems that show partisan bias. *See* King, *Electoral Responsiveness*, 15 Leg. Stud. Q. at 174 & Tbl. 3.

[4] Partisan bias is the deviation from partisan symmetry. A separate concept is "electoral responsiveness." Electoral responsiveness indicates how responsive changes in seat outcomes are to changes in voter preferences. Electoral responsiveness, also referred to as the "bonus" for the majority party, the "swing ratio," or the "degree of representation," measures how much the seat division between the parties change as the vote proportions change. A purely proportional system is one in which a one percent increase in the votes for a party leads to a one percent increase in seats for that party. In the United States, a one percent increase in votes for a party normally leads to a two to three percent increase in seats. Under the symmetry standard, there is nothing necessarily unfair about one party winning a greater proportion of seats than the other. An electoral system may have any degree of partisan bias, no matter what level of responsiveness happens to exist. See Browning & King, *Democratic Representation*, 81 Am. Pol. Sci. Rev. at 1254-58 & 1259 Fig. 3.

The guiding test of the symmetry standard is whether the map treats similarly-situated parties equally—whether both parties have the *opportunity* to capture the same amount of seats, if they receive a particular percentage of the statewide vote. That the Democratic Party may receive only 38% of the seats if it receives 45% of the Statewide vote matters only in comparison to how the Republican Party would fare if it receives 45% of the Statewide vote.

II. WELL-ACCEPTED AND WIDELY USED METHODS EXIST FOR MEASURING THE PARTISAN BIAS OF PROPOSED LEGISLATIVE REDISTRICTING PLANS

A consensus exists about using the symmetry standard to evaluate partisan bias in electoral systems. But such a consensus does not answer the subsidiary question: how to measure symmetry itself in order to determine whether partisan bias exists. Over the more than thirty years that scholars have worked on defining fairness as partisan symmetry, they also have developed a sequence of closely related, and steadily improving, statistical methods that measure the degree of partisan bias in proposed legislative redistricting plans. These methods, outlined in the articles cited in Section I, rely on well-tested and well-accepted statistical procedures.

Statistical methods and computer software using the symmetry standard examine all relevant election-related data, and employ an approach to calculate the difference in seats that the two parties would receive at a given vote level.[5] Using well-accepted techniques, these models allow experts to measure the number of seats that a party would win at a

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[5] This brief provides a relatively non-technical introduction to the research methodology used in the field. The articles cited in the text, published in peer-refereed academic journals, describe the methodology more fully.

given vote level. And the methods can separate partisan bias from other factors. While the actual inputs may vary to some degree from approach to approach, most rely on details of the proposed redistricting plans, all recent election results, the presence of an incumbent in the district, and whether the race is contested. Gelman & King, *Unified Method*, 38 Am. J. Pol. Sci. at 523-25. Other factors may include party registration data, prior party control of the district, candidate quality, and demographic characteristics of the voting age population. *Id.* at 525-26.[6]

Experts can disagree about which set of input data is relevant for a given case, but the resulting measures of partisan bias normally will not differ to any significant degree.[7] Because social scientists studying partisan bias rely on the

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[6] Any number of programs, both commercial and free, can analyze the relevant data to measure partisan bias.

[7] The methodology of quantifying the amount of partisan bias in a particular plan of course is subject to the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 573, 573-75 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149-52 (1999), as is any application of statistical methodology. While the standard methodology for measuring symmetry and partisan bias is well-established, peer-reviewed, and reliable, the question whether it meets *Daubert* is not a question that this Court needs to decide in order to adopt the symmetry standard. Rather, courts will apply the traditional criteria for admitting expert evidence and determine in each case (1) whether the experts are qualified; and (2) whether their particular methodology is reliable. Indeed, a similar process already exists in other voting rights contexts. Under *Thornburg v. Gingles*, 478 U.S. 30, 52-54 (1986), and its progeny, courts regularly use statistics to determine racial bloc voting and to decide whether a minority group can elect a candidate of its choice. In each instance, the court must make a judgment about the expert and the methodology. For a thorough discussion of the different statistical standards used to determine whether a plaintiff has met the *Gingles* test and their reliability, see *Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 995-1005 (D.S.D. 2004) (discussing the various standards and surveying cases that apply these standards).

symmetry standard as the baseline for attempting to calculate the degree of bias, any difference of opinion is limited in scope and concerns chiefly the methodology used to calculate the percentage of seats that a particular party would receive at a given vote level. In practice, these differences have been minor.

Models applying the symmetry standard are by their nature predictive, just as the legislators themselves are predicting the potential impact of the map on partisan representation. The symmetry standard and the resulting measures of partisan bias, however, do not require forecasts of a particular voting outcome. Rather, by examining all the relevant data and the potential seat divisions that would occur for particular vote divisions, it compares the potential scenarios and determines the partisan bias of a map, separating out other potentially confounding factors. Importantly, those drawing the map have access to the same data used to evaluate it, and no data is required other than what is in the public domain. The question is not whether a particular party *will* win; it is whether one party has stacked the deck to such a degree that the plan burdens the other party's "rights of fair and effective representation." *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment). *Cf.* Doris Kearns Goodwin, *Team of Rivals: The Political Genius of Abraham Lincoln* 209 (2005) (noting that in the 1858 Lincoln-Douglas Senatorial election, Lincoln lost even though he received a majority of votes cast because the State Legislature, which picked Senators at the time, was heavily gerrymandered for the Democrats).

III. THE SYMMETRY STANDARD ALLOWS THIS COURT TO DECIDE BY POLITICALLY-NEUTRAL AND OBJECTIVE PRINCIPLES WHETHER A PARTICULAR PLAN IS OVERLY PARTISAN

The ability to quantify partisan bias in a redistricting plan, and to distinguish partisan bias from other factors, permits this Court to adopt a rule that prevents gerrymandering from inhibiting a political group's representational rights. *Amici* take no position on how this Court could best implement a test for unconstitutional partisan gerrymandering that is based on evaluating the level of partisan bias in a plan. Yet the symmetry standard and the methodology applying it are just as "clear, manageable, and politically neutral," *Vieth*, 541 U.S. at 307-08 (Kennedy, J., concurring in the judgment)—if not more so—than other standards used to evaluate districting plans. *See, e.g., Thornburg v. Gingles*, 478 U.S. 30, 55-61, 74-77 (1986) (using statistics to determine the existence of racial bloc voting, a necessary part of any § 2 claim); *Shaw v. Reno*, 509 U.S. 630, 646-49 (1993) (explaining how to decide whether a racial gerrymander is unconstitutional and examining "appearance," among other factors); *Georgia v. Ashcroft*, 539 U.S. 461, 480 (2003) (discussing influence and coalitional districts and noting that "[t]he ability of minority voters to elect a candidate of their choice is important but often complex in practice to determine"). And this Court's jurisprudence in other voting rights contexts suggests three different possible approaches for using the symmetry standard to determine the existence of an unconstitutional partisan gerrymander.

First, this Court could announce a rule of allowing a State to engage in as little partisan bias as necessary to further other compelling interests. In the one-person, one-vote context, this Court has required zero deviation for Congressional districts, while still permitting the State to justify any dis-

crepancy in population with a showing of compelling need. *See, e.g., Karcher v. Daggett*, 462 U.S. 725, 740–41 (1983). Moreover, the State need only achieve complete population equality "as nearly as practicable." *Id.* at 730. So long as a State attempts in good faith to create equal districts, the plan passes constitutional muster. *Id.* at 730-31.

The symmetry standard allows this Court to announce a similar rule in the partisan gerrymandering context: States must make a good-faith effort to achieve as little partisan bias as possible. States could justify any deviation by pointing to a legitimate interest such as compactness, respecting municipal boundaries, or preserving the core of prior districts. *Cf. id.* at 740.

States can comply with the "as little as possible" rule quite simply. The sophistication of computer mapping technologies allows States to add "no partisan bias" to their criteria in creating a redistricting plan. *Cf. id.* at 733 (noting that in 1983, "[t]he rapid advances of computer technology and education during the last two decades make it relatively simple to draw contiguous districts of equal population and at the same time to further whatever secondary goals the State has"). Whenever a State redistricts, it is possible to measure the partisan bias in a plan using the symmetry standard. Likewise, States know the total population before redistricting, and because application of the one-person, one-vote standard is simple, relatively little litigation results. Just as in the one-person, one-vote context, if this Court sets a clear rule beforehand, the amount of litigation about the rule post-issuance would be relatively limited. Finally, a rule of "as little as possible" captures both the "subtle" and the "blatant" gerrymander, each of which burdens a group's representational rights. *Vieth*, 541 U.S. at 316 (Kennedy, J., concurring in the judgment).

Second, this Court could establish a rule that prevents partisan bias to the extent that it allows the manipulating

party to gain control of one or more legislative seats to which it otherwise would not win. In other words, the symmetry standard allows courts to propound a simple and politically-neutral rule—whether the proposed map is so partisan that, as compared to a politically neutral map, it would cause one party to lose a legislative seat. Through the use of experts, a plaintiff would have to prove that a map would cause a group to lose a seat. *Cf. Gingles*, 478 U.S. at 44-46 (imposing a test for justiciability under § 2 of the Voting Rights Act, 42 U.S.C. § 1973, that requires a showing that the minority population is "sufficiently large and compact to constitute a majority in a single-member district" so there exists a potential remedy plan with at least one more district in which minorities have a realistic opportunity to elect candidates of choice than is found in the challenged plan).

Third, this Court could allow partisan bias in districting so long as it does not rise above a certain percentage. The symmetry standard allows courts to calculate the percentage difference in seats that a party would receive at any given level of the vote. If the average percentage difference between the two parties is above a particular threshold (whether it be 3, 5, or 10%), the plan would be unconstitutional. For example, if the court set the standard at 10%, a plan would not be unconstitutional unless the Democratic Party would capture 55% of the seats with 50% of the vote whereas the Republican Party would capture only 45% of the seats with 50% of the vote. *Cf. Brown v. Thompson*, 462 U.S. 835 (1983) (above 10% population deviation is *prima facie* unconstitutional for state legislative districts); *id.* at 852 (outlining test for determining when a plan is unconstitutional).

This third approach allows courts to consider what level of partisan gerrymandering is unconstitutionally "egregious." *Vieth*, 541 U.S. at 316 (Kennedy, J., concurring in the judgment). Studies of past partisan gerrymanders have shown that many gerrymanders have a partisan bias of 1-3 percentage points. In egregious cases, the difference is

greater than 5 percentage points, and it is only in the very rare and extreme case that a gerrymander results in a difference of over 10 points. Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 Am. Pol. Sci. Rev. 541, 546 Fig. 2 (1994) (showing 15 states over a twenty-year period where the partisan bias rarely exceeded 5 percentage points and never exceeded 10 percentage points); Gary King, *Representation through Legislative Redistricting: A Stochastic Model*, 33 Am. J. Pol. Sci. 787, 814 (1989) (noting that the effect of the partisan gerrymander passed by Connecticut in the early 1970s that was at issue in *Gaffney v. Cummings*, 412 U.S. 735 (1973), was 3 percentage points); Robert X. Browning & Gary King, *Seats, Votes, and Gerrymandering: Estimating Representation and Bias in State Legislative Redistricting*, 9 Law & Pol'y 305, 318 (1987) (examining the Indiana plan in the 1980s that was the subject of *Davis v. Bandemer* and concluding that the House plan had a bias of 6.2 percentage points while the Senate plan had a bias of 2.8 percentage points); King & Browning, *Democratic Representation*, 81 Am. Pol. Sci. Rev. at 1262 Fig. 5 (showing bias in all States, with the plurality showing little if any bias, the vast majority falling within 5 percentage points, a few between 5 and 10, and even fewer above 10); *id.* at 1269 (listing bias figures for all States and showing only one State with a bias of above 10 percentage points); Gary W. Cox & Jonathan N. Katz, *Elbridge Gerry's Salamander: The Electoral Consequences of the Reapportionment Revolution* 57-59 (2002) (finding extreme cases of gerrymandering at as much as 8 percentage points).

A rule that tolerates a particular degree of partisan bias would recognize that this Court is willing to permit some amount of burden on the rights of political groups in exchange for limited court involvement in only the most extreme of cases. As experience has shown, and as this Court has recognized, savvy legislators will take advantage of all the leeway that this Court will allow. *Cf. Karcher*, 462 at 731

("If state legislators knew that a certain *de minimis* level of population differences were acceptable, they would doubtless strive to achieve that level rather than equality."). Yet even a rule that policed only extreme cases would curtail some abuses. *Cf.* Gelman & King, *Enhancing Democracy*, 88 Am. Pol. Sci. Rev. at 541 (noting that while a redistricting plan may increase partisan bias in a particular instance, regular redistricting every ten years leads to less partisan bias than no redistricting at all over a period of decades).

Regardless of any rule that this Court adopts—especially if it is no rule—redistricting always will be political to some degree. Yet not all political consequences lead to an unconstitutional burden on the minority party. Any rule limiting partisan gerrymandering still preserves some political component to redistricting. Decisions of where to draw the lines and what communities to include inevitably have some political fallout. The symmetry standard does not necessarily affect the decision of where to place politically-sensitive land. *Cf. Vieth*, 541 U.S. at 358 (Breyer, J., dissenting). Moreover, the majority party may well decide to give the party that wins a majority of the vote (say 51%) an even-greater majority of seats (say 60%). Such a plan favors the majority party, but would not be unconstitutional under any approach so long as the minority party could win the same 60% of seats if it receives 51% of the vote.

And if this Court adopts any rule based on the symmetry standard, lower courts and this Court will flesh out the particulars of the rule in the future. Indeed, in the one-person, one-vote context, once this Court determined the general standards in *Reynolds v. Sims*, 377 U.S. at 377, and *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964), subsequent cases simply became legal arguments about exactly what level of population deviation was unconstitutional in given circumstances. *See, e.g., Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *Mahan v. Howell*, 410 U.S. 315 (1973); *White v. Weiser*, 412 U.S.

783 (1973); *Gaffney v. Cummings*, 412 U.S. 735 (1973); *White v. Regester*, 412 U.S. 755 (1973); *Connor v. Finch*, 431 U.S. 407 (1977); *Brown v. Thompson*, 462 U.S. at 835; *Karcher v. Daggett*, 462 U.S. at 725; *Larios v. Cox*, 300 F.Supp. 2d 1320 (N.D. Ga. 2004) (three-judge panel) (per curiam), *aff'd*, 542 U.S. 947 (2004). Similarly, this Court could set a general rule prohibiting partisan gerrymanders, and let courts decide the specifics of the issue as facts develop in the future. *Cf. Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment) (suggesting that no manageable standard developed after *Davis v. Bandemer* because lower courts could do nothing except follow that decision); *id.* at 344-45 (Souter, J., dissenting) (same).

The signatories of this brief take no position on whether the particular Texas plan in this case is unconstitutional. None has independently examined the partisan bias in the current Texas map. The symmetry standard has achieved consensus within the social science community as a measure of bias because it is a politically-neutral measure that does not require examining proxies such as shape of the district, compactness, or traditional political boundaries. Instead, it evaluates the bias directly by comparing whether the plan treats similarly-situated parties similarly. Regardless of the merits of this particular lawsuit, the symmetry standard is "a suitable standard[] with which to measure the burden a gerrymander imposes on representational rights." *Vieth*, 541 U.S. at 313 (Kennedy, J., concurring in the judgment).

CONCLUSION

In deciding this case, this Court should take into consideration the symmetry standard, as it measures partisan bias itself and it allows courts to decide in a politically-neutral and objective manner whether the State's plan is fair to all political groups.

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IN THE
Supreme Court of the United States

LEAGUE OF LATIN AMERICAN CITIZENS, *et al.*,

TRAVIS COUNTY, TEXAS, *et al.*,

EDDIE JACKSON, *et al.*,

GI FORUM OF TEXAS, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

On Appeal from the United States District Court for the Eastern District of Texas

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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Interest of *Amicus Curiae*[1]

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a nonprofit corporation chartered by the Appellate Division of the New York Supreme Court as a legal aid society. The Legal Defense Fund's first Director-Counsel was Thurgood Marshall. Since its founding in 1939, LDF has been committed to enforcing legal protections against racial discrimination and to securing the constitutional and civil rights of African Americans. *See NAACP v. Button*, 371 U.S. 415, 422 (1963) (describing LDF as a "'firm' . . . which has a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation").

LDF has an extensive history of participation in efforts to eradicate barriers to the full political participation of African Americans in and to eliminate racial discrimination from the political process. LDF has represented parties or participated as *amicus curiae* in numerous voting rights cases before this Court and the United States Courts of Appeals. *See, e.g., Ga. v. Ashcroft*, 539 U.S. 461 (2003); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *United States v. Hays*, 515 U.S. 737 (1995); *League of United Latin American Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (*en banc*), *cert. denied*, 510 U.S. 1071 (1994); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers' Ass'n v. Attorney General of Texas*, 501 U.S. 419 (1991); and *Thornburg v. Gingles*, 478 U.S. 30 (1986). In addition, LDF actively supported the legislative reversal of the decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), which was achieved through the 1982

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[1]Letters of consent to the filing of this brief have been lodged with the Clerk of this Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, made any monetary contribution to its preparation.

amendments to Section 2 of the Voting Rights Act of 1965. *See* VOTING RIGHTS ACT: HEARINGS ON S. 53, S. 1761, S. 1975, S. 1992 AND H.R. 3112 BEFORE THE SUBCOMM. ON THE CONSTITUTION OF THE SENATE COMM. ON THE JUDICIARY, 97th Cong., 2d Sess. 1251-68 (1982) (statement of Julius L. Chambers, President of the NAACP Legal Defense and Educational Fund, Inc.).

Because of its longstanding commitment to the elimination of racial discrimination in the political process and the protection of the voting rights of African Americans, LDF has an interest in these appeals, which present important issues concerning the interpretation and application of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973.

Introduction and Summary of Argument

The four post-2000 Census Texas congressional redistricting cases consolidated before this Court arise from a set of facts that is at once common and extraordinary. The underlying facts are common because they detail a redistricting story in which a partisan majority used its control of the process to extract maximum political advantage. This is unremarkable. Experience teaches that both the Democratic and Republican parties aggressively pursue their partisan motives in redistricting where they can control the process.

The story is extraordinary, however, because the naked partisan objectives of the redistricting process at issue were laid bare by the unusual timing of the line redrawing, and by the means that the proponents employed to achieve their partisan ends. A court-drawn and -approved congressional districting plan fashioned after the 2000 Census, and described as tilting in favor of the Republican party that controls Texas, was deemed not to tilt far enough in an era when computer

innovations have enhanced the possibilities for highly effective gerrymandering. Minority party Democratic legislators fled the state they were elected to serve in an effort to avoid a vote on and passage of the plan that was ultimately passed. Proponents of the "re-redistricting" plan enlisted a federal agency to aid in obtaining the return of the departed state legislators, and longstanding procedural rules of the legislature were nearly abrogated to facilitate passage of the partisan plan.

This set of underlying facts — manifesting familiar redistricting opportunism as well as extraordinary proceedings and techniques — presents this Court for the second time in as many years with the central question whether partisan distortions of the redistricting process can rise to the level of Constitutional injury.

The political aspects of the case have received considerable attention, and any rule(s) that the Court may choose to fashion in service of constitutional guarantees could provide important guidance in establishing the outer bounds to which elected officials may reach in their efforts to place their own, and their parties', interests above those contemplated by the public and Constitutional purposes of redistricting.

Because the cases consolidated before this Court arose in Texas, a state that reflects many of the prevailing demographic patterns and population trends in the United States, there is another — perhaps less discussed but no less important — set of questions that run through the jurisdictional statements. These are questions about minority voting rights and the degree to which contemporary partisan redistricting battles are at tension with well-established legal principles that protect minority citizens' access to the political process and their right to elect candidates of their choice. Not only do partisan manipulations raise questions about the limits of